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Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 214.

CITY AND SUBURBAN RAILWAY OF WASHINGTON,

Plaintiff in Error,

vs.

HEDWIG E. SVEDBORG.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

This case comes from the Court of Appeals of the District of Columbia, on a writ of error to a judgment affirming one of the Supreme Court of the District of Columbia in a cause for personal injuries in which the defendant in error was the plaintiff and the plaintiff in error was the defendant.

The defendant in error, a widow, fifty years of age, had been to her former home in Virginia; on her return she was met at the station by her daughter, Olga, and, after making some purchases on Seventh street, they boarded a car of the plaintiff in error, at Seventh and G streets northwest, in the City of Washington, and rode eastward on it to Eleventh and C streets, northeast, the point nearest their home. The defendant brought with her a basket containing eggs and other

articles from the country and this was handed by the defendant in error to the motorman on the front of the car, when she boarded the same at Seventh street. It was a combination car, the rear-half open and the front-half closed. The open portion had an aisle running through the center and the defendant in error took a place on the front seat of the open portion, at the left of the aisle, while her daughter seated herself in the closed portion of the car. The car stopped on C street at the west side of Eleventh street, northeast, the destination of the defendant in error, and her daughter came out of the closed portion of the car, alighted, and went forward to get the basket from the motorman. He reached for it and was about to give the basket to the daughter of the defendant in error, letting go the brake handle for that purpose and reaching the basket over the platform gate, when the car gave a sudden jerk or lurch.

The defendant in error had followed her daughter from the car and at the time of the lurch or jerk was on the running board at the side of the car, which formed a step to be used by the passengers for descending from the car. She was thrown by the lurch or jerk upon her knees on the ground and the fall resulted in a fracture of her hip in the neck of the femur.

She was carried to her home on Eleventh street and laid upon the bed, without being undressed. That same evening she was visited by the claim agent of the plaintiff in error, Mr. Hoover, who did not, however, see her at this time. Later her family physician, Dr. Keetch, visited her and administered a hypodermic injection of morphine to relieve her pain. Early in the morning following Mr. Hoover called again, this time accompanied by Dr. Stone, the physician to the plaintiff in error. They remained in the house for about half an hour, during which time the only member of the

family present was another daughter of the defendant in error, Lulu. While Dr. Stone engaged Miss Lulu in conversation in the front parlor, Mr. Hoover conversed with the defendant in error, who was still in the adjoining room, not yet undressed, and lying partly on the bed and partly on some adjacent chairs. Hoover's questions and the answers of the defendant in error were taken down in shorthand by the former and subsequently written out by him on the typewriter. While alone with the defendant in error he prepared a statement, on one of the printed blank forms of the company, which the defendant in error signed, being assured by Mr. Hoover that otherwise the motorman and conductor would be put off of the car. The defendant in error did not read the statement, but it was read to her by Hoover. As Hoover and Stone were leaving the house they met Dr. Keetch coming in and Stone returned with him, with the intention of making an examination of the injury to the defendant in error. They found, however, that she suffered so much from any movement of the limb that it was not deemed advisable to make this examination without the use of an anesthetic, and it was therefore postponed until the next day.

She kept her bed for twelve weeks and her room for six months, and at the time of the trial, nearly two years later, had to use a crutch. Her left leg was shortened about two inches by the injury.

The amended declaration alleged, among other things, that because of the defendant's (plaintiff's in error) negligence, the plaintiff (defendant in error) "was greatly bruised and permanently injured about the left hip, and the said hip was permanently fractured and her left leg was permanently shortened, and she became lame and unable to walk without the aid of a crutch." On the plea of "not guilty," issue was joined, and the case went to trial and resulted in a verdict for

the plaintiff (defendant in error) for $6,500, upon which judgment was entered. From that judgment an appeal was taken to the Court of Appeals of the District of Columbia, which affirmed the judgment of the court below; whereupon this writ of error was sued out.

FIRST AND SECOND ASSIGNMENTS OF ERROR.

First. That the court below erred in affirming the ruling of the trial court in refusing to instruct the jury to return a verdict for the plaintiff in error.

Second. That the court below erred in applying the rules res ipsa loquitur to the case in determing the point mentioned in the first assignment of error.

We prefer to discuss both of these assignments together.

The testimony of the defendant in error is clearly stated in the opinion of the Court below in the following words:

> "That she is a widow, fifty years old, living on Eleventh street, northeast; that on the evening of the accident she was on her way home from her country place in Virginia, and that her daughter, then fourteen years of age met her at the depot; that she had brought with her from the country a basket containing eggs and other articles; that she and her daughter boarded the defendant's car at Seventh and G streets going east; that the car, which was a combination car, the closed part being in front and the closed part in the rear, was crowded; that she took a seat in the open car and her daughter in the closed part; that before boarding the car she handed to the motorman thereof her basket; that when the car neared her destination, Eleventh and C streets, northeast, there was only one other passenger, a gentleman, in the car besides herself and daughter; that the car stopped at Eleventh and C streets—on the west side thereof—and her daughter alighted; that

while her daughter was walking up towards the front of the car to procure the basket from the motorman, she attempted to alight, when the car jerked forward and threw her to the ground; that she got up and fell again; * * *

"On cross-examination she stated that the car was standing when she arose from her seat to get off; that she kept her seat when the car stopped, and got up as soon as it stopped; that she stepped on the running board and looked towards the motorman to see if he handed the basket to her daughter; that as soon as her daughter reached to get the basket the car gave a jerk and she was thrown to her knees; that she is not positive whether the car started or gave a jerk; that she was on the running board a second when the car started or jerked; that her daughter got off the car at the side before witness, and had gotten up to the motorman before the car started; that she saw the motorman pick up the basket and hand it to her daughter, when she was thrown." (Record, p. 29; testimony pp. 4-6.)

Her daughter testified as follows (p. 7):

"Q. What caused her to be thrown beside the car?

"A. When the motorman handed the basket over with both hands it caused a jerk.

"Q. A jerk of what, Miss Olga?

"A. A jerk of the car."

And this witness said over and over again, on cross-examination, that the car jerked when the motorman let go the brake lever to hand her the basket.

This evidence established, *prima facie*, the following facts: That there was an accident through which the defendant in error, a passenger on the car of the plaintiff in error, was injured; *that the accident was caused by the sudden move-*

ment of the car, an instrument entirely under the management of the agents of the plaintiff in error.

Here, we submit, was the *prima facie* case required by the doctrine *res ipsa loquitur.*

> "There is a class of cases in which there has been no direct evidence of any particular act of negligence, beyond the mere fact that something unusual has happened, which has caused the injury, and upon the maxim, or rather phrase *'res ipsa loquitur,'* it has been held that there has been negligence."
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> Whittaker's Smith on Negligence, 522.

In the case of Consolidated Traction Co. *vs.* Thalheimer, 59 N. J. L., 474, the plaintiff was injured by being thrown from the car by a sudden lurch as she was about to alight. The Court said:

> "As street cars run upon rails fixed and leveled in the highway, and not permitting lateral motion, and are provided with brakes which, when applied quickly or when, after being applied, are released quickly before the momentum of the car has been overcome, produce known mechanical effects upon persons on the car, the occurrence of a lurch or jerk of the violence described, fairly justifies an inference that either the tracks were improperly laid or the brakes were improperly handled. At all events, the fact that such a lurch or jerk would have been unlikely to occur if proper care had been exercised, brings the case within the maxim of *'res ipsa loquitur,'* as expounded in the Court of Errors in Bahr *vs.* Lombard, Ayres & Co., 53 N. J. L., 233."

In the case of *Bahr* vs. *Lombard, supra,* the Court defines *res ipsa loquitur* as "something in the facts that speaks of the negligence of the defendant."

In *Dougherty* vs. *The Missouri R. R. Co.*, 81 Mo., 325, the plaintiff got on defendant's horse car, and before he could take his seat, the car started forward with a violent jerk, upsetting and injuring him. There was no direct proof that the sudden movement was caused by any act of the driver or team. The Court stated the rule as follows:

> "When the vehicle or conveyance is shown to be under the control or management of the carrier or his servants, and the accident is such as, under the ordinary course of things, does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of proper care."

This doctrine was approved in *Murphy* vs. *St. L. I. M. & S. Ry. Co.*, 43 Mo. App., 343.

In *Murphy* vs. *C. I. & B. R. R. Co.*, 36 Hun, 199, the plaintiff and her young daughter testified that the car gave two jolts and seemed to be lifted off the track and plaintiff was thrown forward and injured. The Court said:

> "The happening of an accident which, in the usual and ordinary course of things, would not happen with proper care, casts the burden upon the defendant of explaining the accident so as to relieve itself from liability. Under the proof the plaintiff can ask an inference of negligence. There was no explanation consistent with it. Proof was given tending to show that it was not true, and that the injury did not result in the manner claimed, but as these questions are questions of fact, the verdict of the jury settles them in favor of the plaintiff. The proof of the injury was ample, if credited, to sustain the verdict.
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> Approved in Webster *vs.* E. C. & N. R. R. Co., 85 Hun, 170.

"It is urged upon the part of the appellant that the only person who testified that the car moved or jerked says she did not see what started it. The car having stopped and the passengers having been called upon to alight, if, in the act of alighting, the plaintiff was thrown from the car, it was necessary for the appellant to prove that it was not responsible for the happening of that movement, in order to absolve itself from liability. It was not incumbent upon the plaintiff to say what caused the jerk. It was negligence upon the part of the appellent to allow the car to move while the passengers were in the act of alighting."

Martin *vs.* Second Ave. R. R. Co., 3 App. Div. (N. Y. S. C.), 348-350.

In the very recent case of *Palmer et ux.* vs. *Warren Street Railway Co.* (—— Pa. St. ——! 56 Atl. 49), the brake chain of a car broke and a collision was threatened with the car in which the plaintiff was a passenger, and she, in fear of such collision, jumped and was injured. The Supreme Court of Pennsylvania said:

"The collision itself, without more, would have been evidence that someone in the employ of the company had blundered, or neglected his duty. As a matter of fact, the collision was due to the breaking of a brake chain; but the case was within the *unbending rule,* applicable to railroad and street passenger railway companies alike, that, *where a passenger on a car is injured without fault of his own, there is a legal presumption of negligence, casting upon the carrier the onus of rebutting it.* Laing v. Colder, 8 Pa. 479; Sullivan v. Philadelphia & Reading Railroad Co., 30 Pa. 234; Meier vs. Pennsylvania Railroad Co., 64 Pa. 225; Philadelphia & Reading Railroad Co. v. Anderson, 94 Pa. 351; Clow v. Pittsburg Traction Co., 158 Pa. 410; Dixey v. Philadelphia Traction Co., 180 Pa. 401; Kepner v. Harrisburg Traction

Co., 183 Pa. 24. And it is immaterial that the collision was not due to any defect in the car on which the plaintiff was riding, or the machinery connected with it, but a broken appliance on a car which ran into it; for the presumption of the defendant's negligence arises not only when the injury is caused by a defect in the road, cars, or machinery, or by want of care or negligence in those employed, but by any other thing which the company can or ought to control as a part of its duty to carry the passengers safely. Meier v. Pennsylvania R. R. Co., supra The other thing here which was under the control of the company was the chain that broke on another car which ran into the one on which the plaintiff had been a passenger."

In the case of *Gleeson* vs. *Virginia Midland R. R. Co.*, 140 U. S. 435-443, this Court said:

"Since the decisions in *Stokes* vs. *Saltonstall*, 13 Pet., 181, and *Railroad Co.* vs. *Pollard*, 22 Wall., 341, it has been settled law in this Court that the happening of an injurious accident is in passenger cases *prima facie* evidence of negligence on the part of the carrier, and that (the passenger being himself in the exercise of due care) the burden then rests upon the carrier to show that its whole duty was performed, and that the injury was unavoidable by human foresight. The rule announced in those cases has received general acceptance; and was followed at the present term in *Inland & Seaboard Coasting Co.* vs. *Tolson*, 139 U. S., 551."

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"The law is that the plaintiff must show negligence in the defendant. This is done *prima facie* by showing, if the plaintiff be a passenger, that the accident occurred. If that accident was, in fact, the result of causes beyond the defendant's responsibility, or of the act of God, it is still none the less true that the plaintiff has made out his *prima facie* case. When he proves the occurrence

> of the accident, the defendant must answer that case from all the circumstances of exculpation, whether disclosed by the one party or the other. They are its matter of defense. And it is for the jury to say, in the light of all the testimony, and under the instructions of the Court, whether the relation of cause and effect did exist, as claimed by the defense, between the accident and the alleged exonerating circumstances" (p. —.)

We submit, therefore, that, at the close of the defendant in error's case, a state of proof existed which called upon the plaintiff in error to make an explanation which should rebut the presumption of negligence thus raised by the evidence for the defendant in error.

Plaintiff in error lays especial stress on the fact that the witness Olga Svedborg varied in her testimony. On the one salient fact that the car gave a jerk and that that jerk threw her mother, the defendant in error, to the ground, she never varied. All other matters testified to by her were colateral to the main one, as stated above.

The two cases from the District Court of Appeals cited in the brief of the plaintiff in error (Weaver vs. R. R., 3 App. Cas. D. C., 436, and Harbison vs. R. R., 9 App. Cas. D. C., 67) differ materially from the one at bar. In neither of those cases was there the slightest evidence of any unusual occurrence contributing to the accident. In the Weaver case (pp. 454-5) the court said:

> Had there been actual proof that the bag was wedged in the catcher so as to require extraordinary exertion to remove it, thereby probably necessitating the exposure of the head of the intestate, which, contributed to by the "lurch of the car," or the not unreasonable "slipping of the feet or hands," may have caused his death, the question of negligence should have been submitted to the

jury. It would have been error to take it away from them.

In the case at bar there was clear testimony tending to prove that there was an unusual occurrence, a jerk or lurch of the car, at a time when it should have been in absolute rest for a passenger to alight.

This explanation from the plaintiff in error being thus called for by the rule, "it was for the jury to say, under all the evidence, whether the explanation, on the part of the defendants, was reasonably made."

Mullen *vs.* St. John, 57 N. Y., 567.

But the plaintiff in error attempted no explanation. As in the Murphy case, in 36 Hun, cited *supra,* it denied the truth of the evidence of the defendant in error of any jerk at all.

The plaintiff in error offered four witnesses to the occurrence, the motorman, Hunt (p. 21); the conductor, Walters (pp. 20-21); the former employee and present passenger, Meade (pp. 22-24); and the motorman of the following car, Mathiot (p. 24). All denied the occurrence—the jerk of the car; no explanation was attempted. Here was a clear, sharp issue of fact, and the defendant in error was entitled to have it go to the jury. Other witnesses, for the plaintiff in error were several expert gentlemen (pp. 24-25) called to prove that the accident could not, in any event, have happened in the manner claimed by the defendant in error; giving the evidence, in fact, required by the rule *"res ipsa loquitur,"* that the accident would not have occurred in the usual and ordinary course of events, with proper management.

The evidence of the plaintiff in error, as to the occurrence, was, therefore, that of employees, except that of

Meade, a former employee, whose theories as to the rights of the public were evidenced to the jury by his statement that he had been a motorman, but had been discharged for an accident which "occurred because a colored woman got too tired to get out of his way, and he hit her with the fender of the car" (p. 23). The employee, Mathiot, was on his car one-half square from the scene of the accident (p. 24.)

With this testimony before it the Court was asked to instruct the jury for the plaintiff in error upon all the evidence, and to the Court's refusal so to do, the plaintiff in error excepted. We submit that the Court did not err.

In the case of *Elwood* vs. *W. U. Tel. Co.*, 45 N. Y. 549-554, there was a controversy about the sending of a message and the defendant's operators were witnesses on its behalf. The Court said:

> "From the necessity of the case, such evidence as there is to that effect proceeds wholly from parties having an important interest in the question. Each of them, if guilty of the negligent act, would have the strongest motive to deny it, as the submission would subject him or her to severe responsibility for the consequences. This is a controlling consideration in determining whether the statements of these witnesses should be taken as conclusive. Without imputing a want of truthfulness to these witnesses, we think that their relation to the subject-matter in controversy was of itself sufficient to take from the Court the right to dispose of the case upon their evidence and to require that the jury should pass upon the weight to be given to them."

In *Volkmar* vs. *Manhattan Ry. Co.*, 134 N. Y., 418, a plate fell from the elevated railroad and injured the plaintiff. The defendant offered as a witness a track-walker, whose duty it was to inspect and repair the structure; he tes-

tified to a recent inspection and performance of his duty. The Court held that "the fall of the plate or clip, in the absence of explanation, raises a presumption of negligence." The *nisi prius* court had directed a verdict for the defendant. The Court of Appeals said:

> "Even if this evidence was sufficient to remove the presumption, as held by the general term, the credibility of the witness would still be involved, and be a question for the jury. The witness was the defendant's track-walker. It was his duty to examine the bolt which was broken. If there was any negligence for which the defendant was chargeable, it was that of this witness. He was, therefore, a person interested and possibly actuated by a motive to shield himself from blame."

Upon broad grounds the plaintiff was entitled to have a verdict of the jury on the evidence, on the *res ipsa loquitur* doctrine. A presumption of fact was raised by the testimony, and dealing with such presumptions is exclusively the province of the jury. Touching this point Mr. Justice Holmes (now a member of this court) says, in *Graham* vs. *Badger,* 164 Mass., 42-47.

> "*Res ipsa loquitur*—which is merely a short way of saying that, so far as the Court can see, the jury from their experience as men of the world may be warranted in thinking that an accident of this particular kind commonly does not happen except in consequence of negligence, and that therefore there is a presumption of fact, in the absence of explanation or other evidence which the jury believe, that it happened in consequence of negligence in this case. Presumptions of fact, or those general propositions of experience which form the major premises of particular conclusions of this sort,

usually are for the jury. The Court ordinarily confines itself to considering whether it can say that there is no such presumption, or in other words, that such accidents commonly are not due to negligence."

Doyle *vs.* B. & A. R. R. Co., 145 Mass., 386-387-388.
Howser *vs.* Cumberland & Penn. R. R., 80 Md., 146.

Aside from the presumption of fact which, as we have submitted, arose from the evidence of the defendant in error, there was a clear issue as to the occurrence upon which that presumption was based, that is the sudden starting of the car.

The rule of this court as to the submission of matters of negligence to the jury is well stated in the following cases:

"The question of negligence is one of law for the court only when the facts are such that all reasonable men must draw the same conclusion; or in other words, a case should not be withdrawn from the jury unless the conclusion follows, as a matter of law, that no recovery can be had upon any view that can be properly taken of the facts the evidence tends to establish."

Gardiner *vs.* R. R. Co., 150 U. S., 349-361.

"When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the question is matter for the jury. It is only where the facts are such that reasonable men *must draw the same conclusions from them,* that the question of negligence is ever considered as one of law for the court."

Texas & P. Ry. Co. *vs.* Gentry, 163 U. S., 353-368.

Applying this principle of law to the case at bar the court below could not, with propriety, have instructed the jury for the plaintiff in error upon all the evidence, and there was no error in refusing so to do.

THIRD ASSIGNMENT OF ERROR.

That the trial court erred in refusing to grant two prayers of the defendant (plaintiff in error).

This assignment is directed to the modification of a prayer of the plaintiff in error which appears on pages 25 and 26 of the record, and to its refusal to grant another, also appearing on page 26. The first was granted in the following language, the italicized words "*or conductor or both,*" being inserted by the court over the objection of plaintiff in error.

> "In order to entitle plaintiff to a verdict, the burden is upon her to prove by a preponderance of the evidence, to the satisfaction of the jury, that the car stopped for her to alight, and that while she was in the act of alighting, the car, through the negligence of the motorman *or conductor or both,* started and thereby threw her to the pavement and injured her, and unless, upon the whole evidence, the jury shall so find, the verdict should be for the defendant."

The gist of the contention of plaintiff in error is that the defendant in error must prove the accident to have been caused by the negligence of the motorman as the defendant in error had exonerated the conductor.

It is a question whether the whole prayer was not open to objection by the defendant in error. Her amended declaration laid the negligence upon the plaintiff in error, not charging it specifically as that of one or more of its agents or servants. The starting of the car, under the declaration, might have been due to the negligence of either the motorman or conductor, or to other agencies whereby the apparatus itself was at fault. The specific cause of the movement which led to the accident, as we have contended, and shown by overwhelming authority, it is not the duty of the defendant in

error to charge or prove; and no attempt was made to do either.

The cause before the jury was made up by the pleadings, and the defendant in error was entitled to the full scope of the issue as thereby made. The declarations of the defendant in error may well have been considered by the jury, but it would have been improper for the court to have limited the issue as those declarations might affect it.

> "An admission by a party that he alone is to blame for an injury sustained by him is an admission of a mixed conclusion of law and fact, and though proper to go to the jury does not conclude the party making it."
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> Daub *vs.* N. P. R. R. Co., 18 Fed., 625.

> "The statements of one injured by the alleged negligence of a railroad company, made after the accident, are not conclusive respecting the manner in which the accident occurred, and the absence of wilful intention to injure him, but may be considered in connection with other circumstances."
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> Cooper *vs.* Railroad, 44 Iowa, 134-137.

The same argument applies to the other prayer which the court declined to give *in toto*.

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